2005

Claudia N. Case, individually, and as Trustee of the Lamar West Trust dated May 6, 1993, and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant/Appellant, v. Arnold K. West and Mary Helen West, Plaintiffs/Appellees : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CLAUDIA N. CASE, individually, and as Trustee of the Lamar West Trust dated May 6, 1993, and as Trustee of the Georgia Lamar West Trust dated January 21, 1999, Defendant/Appellant, vs. ARNOLD K. WEST and MARY HELEN WEST, Plaintiffs/Appellees.	No. 20050315-CA Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal From a Final Civil Judgment of the
Fourth Judicial District Court of Utah County
Judge Taylor, Case No. 990404457

James "Tucker" Hansen
HANSEN & WRIGHT
388 West Center Street
Orem, UT 84057
Telephone: 801-224-2273
Fax: 801-224-2457
Attorneys for Plaintiffs/Appellees

Vincent C. Rampton (USB 2684)
JONES WALDO HOLBROOK & MCDONOUGH PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: 801-521-3200
Fax: 801-328-0537
Attorneys for Defendant/Appellant

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JONES WALDO HOLBROOK & MCDONOUGH PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: 801-521-3200
Fax: 801-328-0537
Attorneys for Defendant/Appellant

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Defendant and Appellant Claudia N. Case, individually and as Trustee of the Lamar West Trust dated May 6, 1993 and the Georgia Lamar West Trust dated January 21, 1999, by counsel and pursuant to Rule 24(c), Utah Rules of Appellate Procedure, submits the following Reply Brief in support of her appeal from the trial court's orders entered in the above-entitled action.

ARGUMENT

POINT I. THE TRIAL COURT IMPROPERLY QUIETED TITLE TO THE SUBJECT PROPERTY IN APPELLEES.

Appellees first take the position that they are invulnerable to challenge in having persuaded the trial court to quiet title to a property in which they claimed no present interest, since it was not properly preserved before the trial court, and was properly pled in any case. This argument suffers two fatal flaws.

A. The Trial Court Lacked Subject Matter Jurisdiction of Appellees' Quiet Title Claim.

First (and as noted in Appellant's opening Brief), a trial court's lack of jurisdiction over the subject matter of a claim may be raised at any time during the proceeding. (*See* Appellant's opening Brief at 3.) A quiet title claim is a statutory proceeding and remedy, the elements of which are defined (and necessarily proscribed) at Utah Code Ann. § 78-40-1, *et seq.* For those reasons more fully addressed at 19-20 of Appellant's opening Brief, an action to quiet title must rest on a claim of title in property, not an attempt to

wrest title from another. The cause of action is unavailable for such a purpose, and those who invoke it as such seek a remedy not provided under the statute.

Utah Code Ann. § 78-3-4(1) confers upon the district courts of the state of Utah "original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution *and not prohibited by law*." (Emphasis added.) Prosecution of a non-existent cause of action – quieting title in property to which the claimant asserts no ownership interest – is by definition an action "prohibited by law" by the very nature of the limited cause of action conferred by the legislature. To brush such an error aside as nothing more than a waivable irregularity in pleadings would be to ignore the limited scope of the cause of action. Appellant's argument that the trial court exceeded the limitations of its subject matter jurisdiction in quieting title to property neither owned nor claimed by Appellees goes far beyond a simple 12(b)(6) motion which Appellant forgot to make. It is, rather, the exercise of jurisdiction over a cause of action outside the scope of what the legislature granted, and therefore prohibited by law.

B. Appellees Neither Claimed Nor Established a Right in the Subject Property, Prior to the Court's Order of Summary Judgment, Sufficient to Sustain a Quiet Title Claim.

Appellees next claim that their cause of action before the trial court was, in fact, a quiet title claim (even though they sought an order compelling the conveyance of the property to them). The Court need go no further than the face of Appellees' Complaint to see the fallacy in their reasoning.

Appellees nowhere claimed before the trial court that the warranty deed held in trust pending completion of the Uniform Real Estate Contract operated, without more, to convey title to the Subject Property (as indeed, they cannot – a deed held in trust only is not operable to convey an interest in property – *see Kressler v. Peterson*, 675 P. 2d 1193 (Utah 1984); *Tanner v. Carter*, 2001 UT 18, 20 P. 3d 332). Appellees' claim, rather, is that Georgia Lamar West (and thereafter Appellant) was obliged, but had *refused*, to convey title to the Subject Property in 1998, when Appellees made demand therefor. Whether that refusal constituted breach of the Uniform Real Estate Contract (and if so, by whom) was the subject matter of the claim, and of the court's orders on summary judgment. As such, the quiet title claim was out of place, and should not have been entertained.

POINT II. GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED THE TRIAL COURT FROM RULING, AS A MATTER OF LAW, THAT GEORGIA LAMAR WEST HAD "WAIVED" APPELLEES' CONTRACTUAL DUTY TO PAY TAXES.

Appellees offer a number of arguments in support of the trial court's conclusion that, as a matter of law, Georgia Lamar West waived their contractual obligation to pay taxes on the Subject Property. Yet in their own Brief, Appellees acknowledge that any claim of contractual waiver is, by its nature, "extremely fact-sensitive" – Appellees' Brief at p. 20. Appellant agrees. The lower court should have deferred to a finder of fact following full presentation of the facts at trial.

A. Appellant Presented the Trial Court, and This Court, With Sufficient Information by Affidavit to Establish a Genuine Issue of Material Fact Concerning the Alleged Waiver.

Appellees first argue that they were entitled to the trial court's finding that Georgia Lamar West "waived" their obligation to pay taxes under the contract, in that they established a "*prima facie* case" of waiver, which Appellant thereafter failed to rebut. The Court need go no further than the facts as summarized at pps. 25-26 of Appellant's opening Brief to see the fallacy of this position.

Summary judgment is inappropriate where the opposing party presents facts which, if construed in that party's favor, would preclude the requested relief. *Ahlstrom v. Salt Lake City Corporation*, 2002 Utah 4, 73 P.3d 315; *Arnold Industries, Inc. v. Love*, 63 P.3d 721 (Utah 2002). In her submittals to the trial court, Appellant established both words and conduct from Georgia Lamar West completely inconsistent with the required intent to relinquish a known right – statements to Appellant that Appellees were failing to pay the taxes (R. 0666); conveyances of Georgia Lamar West's interest in the Property to the trusts, in derogation of Appellee's claims (R. 0015); and her refusal to convey the Property to Appellees upon demand, even when they claimed to have performed under the contract (*Id.*). No amount of re-characterization on Appellees' behalf can erase the existence of a judicable controversy over whether, under a totality of circumstances, Georgia Lamar West did or did not intend to rewrite the 1987 Agreement to impose upon herself (rather than Appellees) the obligation to pay taxes while they were occupying the

Subject Property, and otherwise performing according to the terms of the Agreement. Appellant was clearly entitled to trial on this issue.

B. Appellees Received Ample "Written Notice" of Georgia Lamar West's Intent to Declare Their Default.

While they do not urge the point as a defense in the "Argument" section of their Brief, Appellees make passing reference in their "Statement of Facts" to the 1987 agreement's requirement that a default be preceded by "written notice". The contract is silent, though, as to when the written notice must issue, who must send it, to what individual or address it must be sent, or what it must contain.

Appellees have received an abundance of "written notice" that Georgia Lamar West did not intend to convey the Subject Property to them due to their failure to pay taxes thereon – from the notice received from the Utah County Recorder's Office upon their attempt to record the Warranty Deed in 1998 that the Property had been conveyed to the trust, to pleadings, moving papers, and correspondence of counsel, to the responsive pleadings in this action. The purpose of any written notice provision in an agreement is to put the affected party on notice of the other party's intentions. Appellees can hardly claim ignorance in this regard (as the trial court apparently believed – none of the decisions of the trial court from which this appeal is taken addressed the notice issue in any way).

C. Appellant Was Not Required to "Marshal the Evidence" in Challenging an Order Granting Summary Judgment.

At pps. 19-20 of their Brief, Appellees make the singular argument that Appellant may not challenge the lower court's Order Granting Summary Judgment on the question whether Georgia Lamar West waived her right under the real estate contract at issue in this action, because she has failed to "marshal the evidence" in support of the lower court's ruling. Appellees cite the Court to *Chen v. Stuart*, 2004 Utah 82, 100 P.3d 1177, and cases cited therein.

To begin with, there was no trial in this matter. The Court entered summary judgment on the basis of Appellees' Affidavits, which have been made a part of the record herein, and cited to in Appellants' opening Brief. Pages 20-27 of Appellant's opening Brief discussed the reasons why the Affidavits should not have precluded the existence of genuine issues of material fact, defeating summary judgment. With no trial record, Appellees' vague demand that there be more "marshalling" of evidence than this is a mystery.

More fundamental, though, is the fact that Appellees' argument completely misapprehends the standard of review applicable to orders granting summary judgment. The *Chen* decision addressed findings of fact made by the trial court following a non-jury trial, which the appellate court reviews under a "clearly erroneous" standard:

> A trial court's findings will not be set aside unless clearly erroneous . . . *in order to establish that a particular finding of fact is clearly erroneous, '[a]n appellant must marshal the evidence in support of the findings and*

> *then demonstrate that despite this evidence, the trail court's findings are so lacking in support as to be against the clear weight of the evidence.*' (Citing *Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989)).

2004 Utah 82 at ¶ 19 (emphasis added).

An order granting summary judgment, by contrast, is not reviewed under a "clearly erroneous" standard, as it does not entail a weighing or sifting of evidence. It presupposes that there is *no* genuine issue of material fact. This Court affords the trial court no deference whatever in the making of this determination; rather, it presumes all factual questions *against* the movant, and reviews the trial court's legal determination *de novo* for correctness (*see* cases cited under subpoint A, above). Only if the trial court's application of the correct law to all facts viewed in the light most favorable to the non-moving party still justifies the entry of summary judgment will be trial court's ruling be sustained. *See generally Miller v. Celebration Mining Company*, 29 P.3d 1231 (Utah 2001).

To demonstrate the trial court's error in granting summary judgment herein, Appellant was required only to present evidence by affidavit sufficient to meet the requirements of Rule 56(e) Utah R. Civ. P. For those reasons set out above and in her opening Brief, Appellant submits that she has clearly done so. She is not required to marshal evidence supporting the trial court's "findings", and then overcome any presumption created by the "clearly erroneous" standard of review.

D. Appellant Could Not Raise the Statute of Frauds as an Affirmative Defense in Her Answer, as It Rebutted No Allegation in the Complaint.

In response to Appellant's argument that the transfer of tax payment obligations from Appellees to Georgia Lamar West was a modification of the 1987 agreement which needed to be in writing, Appellees point out that the Utah Statute of Frauds was not pled as an affirmative defense in Appellant's Answer (Appellees' Brief at 20-21).

It is true that a defense based upon the statute of frauds is by definition an "affirmative defense" which must be pled in response to a claim. The difficulty here, though, is that that statute of frauds did not directly address any of the operative allegations of the Complaint. Nowhere in their Complaint did Appellees make the assertion that, even though they had failed to pay the taxes on the Subject Property, Georgia Lamar West had excused that performance by an express waiver or novation of contract. Appellees allege, rather, that they had performed in full under the contract – an allegation which Appellant denied. (Complaint, R. 0015 at ¶ 10; Answer, R. 0024, at ¶ 9.) Only during the course of motion practice (which resulted in the Order Granting Partial Summary Judgment in Appellees' favor) did Appellees admit that they paid no taxes, but claimed that Georgia Lamar West had excused their performance in this regard through an express novation or waiver. As such, Appellant's failure to raise the statute of frauds as an affirmative defense cannot be deemed a waiver of that defense in face of later-asserted claims.

E. Appellees' Claimed Modification of the Uniform Real Estate Contract Is Not Outside the Statute of Frauds.

Appellees argue, at pps. 21-22 of their Brief, that their alleged verbal agreement with Georgia Lamar West, under which she assumed the obligation to pay taxes on the Subject Property on Appellees' behalf, falls outside the statute of frauds because they have "changed position by performing an oral modification" (citing *Allen v. Kingdon*, 723 P.2d 394 (Utah 1996), as well as cases invoking the doctrine of "part performance").

Appellees fail, however, to articulate any change in their position which would render inequitable the enforcement of the contract as originally framed. It is Appellees' position that Georgia Lamar West knowingly and voluntarily paid taxes on their behalf, while letting them continue in occupancy of the Subject Property, as a result of a verbal understanding. As such, the only "change of position" to which Appellees can point is that they have not paid the taxes, or reimbursed anyone for having done so on their behalf. The doctrine of part performance calls for some significant change of position in reliance upon a promise, such that the party invoking the doctrine would suffer injury through imposition of the statute of frauds. The only injury which Appellees would incur would be the necessity of performing as per their agreement, and reimbursing the estate of Georgia Lamar West for taxes paid. The doctrine of part performance has no application under these circumstances.

POINT III. APPELLEES' FAILURE TO PERFORM THE UNIFORM REAL ESTATE CONTRACT, AS A CONDITION PRECEDENT TO SEEKING SPECIFIC PERFORMANCE, MAY NOT BE EXCUSED UNDER DEFENSES APPLICABLE TO THE DOCTRINE OF "UNCLEAN HANDS".

At pps. 16-17 of their opposing Brief, Appellees argue that their failure to perform the requirements of the 1987 Uniform Real Estate Contract was excusable by the trial court under the doctrine of "unclean hands," as there was no showing of bad faith (Appellees' Brief at pps. 16-17). Appellees' argument, however, misapprehends the requirements underlying specific performance.

For those reasons set out at pps. 21-23 of Appellant's opening Brief, a party seeking specific performance must "do equity" by performing under the terms of the contract. There is no requirement, under the governing case law, that failure to perform be motivated by malice, bad faith or intent. By their own admissions, Appellees failed outright to perform a material requirement of the real estate contract. Under the cases cited in Appellant's opening Brief, this should have been fatal to their claim for specific performance – whether their failure rose to the level of "unclean hands" or not.

POINT IV. APPELLANT (IN HER CAPACITY AS TRUSTEE) WAS NOT A PARTY TO THE 1987 AGREEMENT, AND SHOULD NOT HAVE BEEN HELD LIABLE FOR BREACH THEREOF.

Appellees' opposing Brief fails completely to dislodge the fundamental fact that Appellant (whether individually or in her capacity as trustee of Georgia Lamar West's

two trusts) was not party to the 1987 Agreement, and may not be held liable for any breach thereof. The decision of *Oquirrh Associates v. First National Leasing Company*, 888 P.2d 659 (Utah Ct. App. 1994) clearly established a distinction which neither the trial court, nor Appellees' arguments on appeal, can overcome. Georgia Lamar West's quit claim conveyance of her right, title and interest in and to the Subject Property did not operate to convey, assign, or otherwise transfer any right or interest *in the contract*, but only *in the premises*. *See* 888 P.2d at 663. Appellees' own argument, at pps. 22-23 of their Brief, implicitly acknowledges that some transfer of the contract right – not the premises – must occur in order to hold Appellant liable thereunder. By law, and according to the *Oquirrh* decision, a quit claim deed simply does not rise to that level.

Appellees assert that Appellant's position, if accepted, would permit Georgia Lamar West's estate to escape all liability under the contract. Quite the contrary – Appellant acknowledged that, if the lower court properly found that Appellees were contractually entitled to conveyance of the Subject Property, the Estate of Georgia Lamar West is legally accountable therefor. Their contractual obligation, however, did not pass to Appellant (or the trusts) by virtue of a single quit claim deed. So long as the *Oquirrh* decision remains governing law, Appellant may not be found liable for breach of the 1987 Agreement.

POINT V. APPELLANT WAS ENTITLED TO ORAL ARGUMENT BEFORE THE TRIAL COURT.

Reduced to its essence, Appellees' argument concerning the trial court's failure to afford Appellant oral argument before entering summary judgment is that, since Appellant had failed to demonstrate, in her written submittals, the existence of a genuine issue of material fact, the error was harmless. Were this Court to adopt such a standard, the right to oral argument articulated at former Rules of Judicial Administration 4-501(3)(C) (now subsumed under Rule 7(E), Utah R. Civ. P.) would become meaningless. The prevailing party on a dispositive motion may *always* contend that oral argument would not have affected the outcome. By the same token, the party against whom a ruling is entered on written submittals cannot possibly articulate every circumstance which might have arisen during oral argument, and affected the resulting decision. It is for this very reason that the Rules expressly provide for oral argument on motions which may dispose of all or part of a pending action, as a matter of right.

Appellees cite inapplicable case precedent concerning issues of a strictly legal nature, and contend that by reason thereof, the trial court's denial of oral argument in this case was not prejudicial. Yet by Appellees' own admission, the lower court's findings in this case were "extremely fact-sensitive"– Appellees' Brief at p. 20. The trial court's open disregard of factual issues and disputes in the entry of its ruling bear out the fact that it simply failed to come to grips with this extreme fact sensitivity. It is self-evident that oral argument could have improved the trial court's understanding in this regard.

CONCLUSION

For the foregoing reasons, as well as those set out in her opening Brief, Appellant submits that the trial court's entry of summary judgment herein was erroneous, and should be reversed.

DATED this 21st day of September, 2005.

JONES WALDO HOLBROOK & McDONOUGH, PC

By _____
Vincent C. Rampton
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to the following this 21st day of September, 2005:

James "Tucker" Hansen
James "Tucker" Hansen, P.C.
306 West Main Street
American Fork, UT 84003